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SERVICE DATE - AUGUST 8, 1997

SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41518

# WEYERHAEUSER COMPANY--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF TRANSCON LINES

Decided: August 4, 1997

This proceeding arises out of the efforts of the trustee in bankruptcy of Transcon Lines (Transcon or respondent), a former motor carrier, to collect undercharges based on common carrier tariffs for certain transportation services performed by Transcon for Weyerhaeuser Company (Weyerhaeuser or petitioner). We find that the collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Accordingly, we will not reach the other issues raised in this proceeding.

## BACKGROUND

This matter is before the Board on referral from the United States Bankruptcy Court, Central District of California, in *Leonard L. Gumport, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines v. Weyerhaeuser Company*, Case No. SB 93-22207 DN, Chapter 7, Adv. No. SB 94-01957 DN (referral order dated September 28, 1994). The court stayed the proceeding to enable referral of issues of rate reasonableness and unreasonable practice to the ICC for determination.

Pursuant to the court order, petitioner, on December 27, 1994, filed a petition for declaratory order requesting the ICC to resolve issues of tariff applicability, unreasonable practice, and rate reasonableness. By decision served January 9, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. On March 10, 1995, petitioner filed its opening statement. Respondent filed its reply on July 7, 1995. Petitioner submitted its rebuttal on July 27, 1995.

Petitioner asserts that Transcon's efforts to collect the claimed undercharges constitute an unreasonable practice under section 2(e) of the NRA. Petitioner maintains that the written evidence it has submitted shows that Transcon offered transportation rates upon which the petitioner relied in tendering shipments to Transcon; that the offered rates were billed and collected by Transcon; and that the payments made by petitioner were accepted by Transcon as payment in full.

In a declaration submitted as part of Weyerhaeuser's evidentiary submission, John B. Ficker, currently petitioner's Regulatory and Contract Support Manager, states that he is generally familiar with Weyerhaeuser's business operations and was familiar with petitioner's transportation arrangements with Transcon during 1987 to 1990, when respondent provided the service on which the subject undercharge claims are based. Mr. Ficker asserts that Transcon offered to transport Weyerhaeuser's products at discount rates and that petitioner relied upon those rates in tendering its

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

traffic to respondent. He states that Transcon billed petitioner at the agreed-upon discounted amount, that the billed amount was promptly paid by petitioner, and that petitioner's payment was accepted by Transcon without objection. Attached as Exhibit A to Mr. Ficker's declaration are written communications from Transcon relating to Weyerhaeuser traffic in which reference is made to authorizing discounts ranging from 35% to 46%.

Attached as Exhibits B1 and B2 to petitioner's opening statement are 10 sample revised freight bills[2] relating to shipments transported between October 14, 1987, and January 26, 1989. Incorporated within each of the submitted sample bills is the original freight charge billed by Transcon and paid by Weyerhaeuser, the corrected charge assessed by Transcon, and the asserted balance due amount. An examination of the sample revised freight bills indicates that respondent has totally eliminated the originally applied discount for 7 of the subject shipments, reduced the originally applied discount (from 46 to 30 percent) for 2 of the shipments, and imposed a minimum charge higher than the originally assessed charge for 1 shipment.

Respondent's statement consists of legal argument of counsel. Respondent maintains that petitioner has not proffered written proof that the rates negotiated had been agreed upon, i.e., written evidence of the original rate charged or evidence that petitioner reasonably relied on this rate. Respondent also contends that section 2(e) of the NRA does not apply retroactively to pending claims such as those which are the subject of this proceeding.[3]

## DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[4]

It is undisputed that Transcon no longer transports property.[5] Accordingly, we may proceed to determine whether the respondent's attempt to collect undercharges is an unreasonable practice.

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[2] Exhibit B1 contains nine revised freight bills provided to petitioner by respondent printed from a computer disk format. Exhibit B2 contains a copy of one revised freight bill printed in the actual format in which the corrected freight bill was issued.

[3] With respect to the retroactive applicability of section 2(e), we point out that the courts have consistently held that section 2(e) by its own terms, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. *See, e.g., Gold v. A.J. Hollander Co. (In re Maislin Indus.*), 176 B.R. 436, 443-44 (Bankr. E.D. Mich. 1995); *Jones Truck Lines, Inc. v. Scott Fetzer Co.*, 860 F. Supp. 1370, 1375-76 (E.D. Ark 1994); *North Penn Transfer, Inc. v. Stationers Distributing Co.*, 174 B.R. 263 (N.D. Ill. 1994); *Allen v. National Enquirer*, 187 B.R. 29, 33 (Bankr. N.D. Ga. 1995); *cf. Jones Truck Lines, Inc. v. Phoenix Products Co.*, 860 F. Supp. 1360 (W.D. Wisc. 1994).

[4] Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

[5] Transcon held both motor common and contract carrier operating authority, issued by the ICC under various sub-numbers of No. MC-110325. All of Transcon's operating authorities were revoked on September 21, 1990.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains written communications from Transcon indicating approved authorization for applying discounts ranging from 35% to 46% when transporting Weyerhaeuser traffic. In addition, petitioner has submitted representative original freight bills issued by Transcon indicating the application of rate discounts to the subject traffic. We find this evidence sufficient to satisfy the written evidence requirement. *E.A. Miller, Inc.--Rates and Practices of Best,* 10 I.C.C.2d 235 (1994) (*E.A. Miller*). *See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp.*, C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rates and that the rates were agreed upon by the parties).

In this case, the evidence indicates that the parties conducted business in accordance with agreed-to negotiated rates. The written communications from Transcon and the sample revised freight bills which embody the originally assessed charges submitted by petitioner confirm the unrefuted testimony of Mr. Ficker and reflect the existence of negotiated rates.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here the evidence establishes that negotiated rates were offered by Transcon to Weyerhaeuser; that Weyerhaeuser tendered freight to Transcon in reliance on the negotiated rates; that the negotiated rates were billed and collected by Transcon; and that Transcon now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Transcon to attempt to collect undercharges from Weyerhaeuser for transporting the shipments at issue in this proceeding.[6]

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

*It is ordered*:

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[6] Although the record here does not contain all of the freight bills for which respondent seeks undercharges, it does contain sample freight bills which appear to be representative of all of Transcon's undercharge claims. These freight bills constitute written evidence of a negotiated rate as to the specific shipments identified in the freight bills. The record also contains the uncontroverted testimony of Mr. Ficker as to Weyerhaeuser's reliance on the originally negotiated rates. Transcon's general assertion that petitioner has not provided written evidence of the rate originally charged or of the shipper’s reliance on that rate clearly fails as to those shipments identified in the freight bills.

As to any other shipments with respect to which specific freight bills were not submitted, where the documentation is similar to that presented in the sample freight bills, it would be an unreasonable practice for Transcon "to attempt to recover the difference between the applicable tariff rate . . . and the negotiated rate." Accordingly, we advise the court of our legal opinion that, to the extent other undercharge demands follow the pattern outlined here, they too would constitute an unreasonable practice.

1. This proceeding is discontinued.

2. This decision is effective on its service date.

3. A copy of this decision will be mailed to:

The Honorable David N. Naugle
United States Bankruptcy Court,
Central District of California
200 Federal Building
699 North Arrowhead Avenue
San Bernardino, CA 92401

Re: Case No. SB 93-22207 DN, Chapter 7
Adv. No. SB 94-01957 DN

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary